

## PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.

<http://hdl.handle.net/2066/150373>

Please be advised that this information was generated on 2017-12-05 and may be subject to change.

# Recognition of US Class Actions or Settlements in Europe

by

Tomas Arons\*

*With the Morrison-judgment, access to US securities class actions is denied for non-US transactions. Granting preclusive effect to class settlements concluded with European investors should prevent re-litigation before European courts. Recognising US class action/settlement judgments under Dutch, French English and German law requires the following: (1) the US courts must have had jurisdiction; (2) the class must have been properly notified; (3) opt-out mechanisms must not be manifestly against public policy; and (4) interested parties must be sufficiently informed. Absent class members are bound unless they explicitly opt out. European jurisdictions (recently) allow for a similar binding effect. The Dutch WCAM and the English representative actions have opt-out features. The German Capital Market Model Case proceedings is based on the opt-in model; only persons bringing a claim before a (lower) court are bound to the outcome of the model case proceedings. The recently adopted French collective action proceedings are also opt-in, however, filing an individual (damage) claim is not required at the first stage in which a representative organisation requests the court to rule whether the defendant acted tortiously towards the represented group.*

Table of Contents

ECFR 2015, 462–487

1. Introduction . . . . .	463
2. US collective action: recognition issue . . . . .	465
3. Recognition of US class action/settlement judgment under Dutch law . . . . .	468
4. Recognition of US class action judgments and settlements under French law . . . . .	473
5. Recognition of US class action judgments and settlements under English law . . . . .	478
6. Recognition of US class action judgments and settlements under German law . . . . .	481
7. Recognition under EU law . . . . .	484
8. Concluding remarks . . . . .	485

\* Assistant professor at the Institute for Financial Law as part of the Business & Law Research Centre (Onderzoekcentrum Onderneming & Recht, OO&R) of the Radboud University Nijmegen.

### 1. Introduction

With the *Morrison v National Australia Bank*<sup>1</sup> judgment, the United States Supreme Court ('USSC') ruled that the protection of US federal securities legislation<sup>2</sup> is not available to foreign claimants suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. These cases are referred to as f-cubed<sup>3</sup> securities fraud cases. After diverse court rulings on the question whether foreign claimants who bought the defendant's securities on a foreign exchanges could be part of the class in a federal class action against foreign defendant companies accused of violating US federal securities legislation, the USSC effectively denied these foreign claimants access to US class actions.

In order to proceed as a federal class action, it is required that a court certifies the class, i.e. the court rules that the prerequisites to pursue as a class action are met. One of these prerequisites is that the questions of law or fact common to class members predominate over any questions affecting only individual members. Furthermore, it is required that a class action is superior to other available methods for fairly and efficiently adjudicating the dispute.<sup>4</sup>

In the above-mentioned f-cubed securities fraud cases, courts had to rule on the defence motion that the foreign claimants could not be part of the class because the class action judgment would not be recognised by the foreign

1 *Morrison v National Australia Bank Ltd*, 24 June 2010, 129 S.Ct. 2762, 174 L.Ed.2d 246.

2 In particular section 10(b) of the Securities and Exchange Act of 1934 ('1934 SEA'). It prescribes that: '[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.' Pursuant to its authority granted under the 1934 SEA, the Securities and Exchange Commission ('SEC') adopted Rule 10b-5 that prohibits the following: '[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.'

3 Foreign claimants suing before US courts foreign defendants for securities bought on foreign exchanges.

4 Rule 23(b)(3) of the US Federal Rules of Civil Procedure.

courts. Hence, a US class actions is not a superior method of adjudication because the issue could be re-litigated before a foreign court not granting preclusive effect or *res judicata* to the US class actions judgment. The US courts quite extensively reviewed evidence on the likelihood of recognition of class action judgments by courts in Germany, France, Austria, the UK and the Netherlands. After the *Morrison v National Australia Bank*-judgment, it is clear that European investors who acquired their securities on a non-US exchange can no longer be part of a US class action. Nonetheless question of recognition of US class action judgments by courts in the EU remain important for various reasons. Especially, the opt-out character of a US class action judgment or class settlement reached between the lead plaintiff and the (lead) defendant before the final class action judgment is given, seems an obstacle to recognition. Article 6 of the European Convention on Human Rights ('ECHR') and various constitutions in Europe guarantee their citizens a right to a fair trial. It has been argued that this right may be violated when individual claimants who did not opt out are bound by the class action/settlement judgment.

First of all, no formal convention on jurisdiction and recognition is available between the above-mentioned European jurisdictions or the EU and the USA. Secondly, US class settlements with European class members are used as defences against damage claims by European investors before European courts.<sup>5</sup> The question of reciprocal recognition has been enhanced by the enactment of the Dutch Collective Settlement of Mass Damage Act (*Wet Collectieve Afwikkeling Massaschade*, "WCAM"). The WCAM provides for a judicially approved settlement agreement declared binding on all class members unless they opt out.<sup>6</sup> Because of this mass settlement mechanism available in Europe, it is even more important for defendants that US class action settlements are recognised and granted preclusive effect. Otherwise, claimants could re-litigate or resettle claims already dealt with.

In paragraph 2, I will briefly discuss US case law on the questions of superiority and predominance in f-cubed securities class actions; cases in which the recognition issue arose. Paragraph 3 describes the recognition of judgments by

5 Amsterdam District Court 23 June 2010 (*SOBI/Deloitte*), ECLI:NL:RBAMS:2010:BM9324, *JOR* 2010, 225 with commentary from I.N. Tzankova; Amsterdam District Court 26 June 2013 (*VEB/Deloitte*), ECLI:NL:RBAMS:2013:4617.

6 In principle the binding declaratory judgment of the Amsterdam Court of Appeal has to be recognised by the courts in the EU. See also: T.M.C. Arons and W.H. van Boom, 'Beyond Tulips and Cheese: Exporting Mass Securities Claim Settlements from The Netherlands' (2010) 21 *European Business Law Review* 6, pp. 857–883; T.M.C. Arons, *Cross-Border Enforcement of Listed Companies' Duties to Inform* (Kluwer 2012), ch. 11; A. Stadler, 'Die grenzüberschreitende Durchsetzbarkeit von Sammelklagen' in M. Casper et al (eds), *Auf dem Weg zu einer europäischen Sammelklage?* (Sellier 2009); A. Stadler, 'Grenzüberschreitender kollektiver Rechtsschutz in Europa' (2009) 3 *JZ*, pp. 121–133.

non-US courts. The recognition of US class actions/settlement judgments by the Dutch courts, especially in the *SOBI*/*Deloitte*- and the *VEB*/*Deloitte*-case will be discussed in paragraph 4. Paragraph 5 deals with the question of recognition by French courts. The answer in this regard under English and German law will be analysed in paragraphs 6 and 7 respectively. Paragraph 8 provides a brief discussion how this question of recognition is dealt with under EU law. In paragraph 9 some concluding remarks are given.

## 2. US collective action: recognition issue

Before setting out the role played by question of international recognition of US class action/settlement judgments in f-cubed securities fraud cases, I will briefly discuss the private international issues dealt with in *Morrison v NAB*.<sup>9</sup> On the basis of the so-called conduct test, the US courts assumed jurisdiction if the securities fraud in the USA is the direct result of conduct outside the USA.<sup>10</sup> In order to assess whether a class action is superior, the court in the *Vivendi*-case applied the test whether the plaintiffs were able to establish a sufficient probability that a foreign court will recognise and grant *res judicata* or preclusive effect to a US class action judgment. On the basis of expert evidence, the court ruled that recognition of the US class action was likely under French, Dutch and English<sup>11</sup> law. Therefore, the court granted certifi-

7 SOBI is the Dutch Company Information Research Foundation (*Stichting Onderzoek Bedrijfsinformatie*).

8 VEB is the Dutch Shareholders Association (*Vereniging van Effectenbezitters*).

9 On personal jurisdiction in class action proceedings: *Newberg on Class Actions* (4th edn), § 1.15; § 22.13.

10 Cf. *Vivendi*-case where the French media company Vivendi dually listed in New York and Paris, was sued by shareholders who claimed damages. The plaintiffs allege that the defendants (*Vivendi*, its former CEO, Mr Messier, and its former CFO, Mr Hannezo) continued reporting favourable financial results resulting in a series of false and misleading public statements. Moreover, the plaintiffs allege that the defendants filed financial statements at the SEC that were materially false and misleading. Thereby they violated sections 10(b) and 20(1) of the 1934 Act and SEC Rule 10b-5. *In re Vivendi Universal, S.A. Securities Litigation* 381 F.Supp.2d 169 (4 November 2003, U.S.D.C./S.D.N.Y.) (*Vivendi I*). Upheld in No.02 Civ. 5WL 2375830 (22 October 2004, U.S.D.C./S.D.N.Y.) (*Vivendi II*). *In re Alstom SA Securities Litigation*; *In re Royal Bank of Scotland Group PLC Securities Litigation*; *In re Societe Generale Securities Litigation* the conduct test was applied as well.

11 M.P. Murtagh, 'The Rule 23(b)(3) Superiority Requirement and Transnational Class Actions: Excluding Foreign Class Member in Favor of European Remedies' (2011) 1 *Hastings Int'l & Comp. L. Rev.*, p. 30, Fn. 163 notes that this result in the *Vivendi* case conflicts with at least one earlier case involving a UK defendant, where certification was denied because, *inter alia*, a judgment in favour of defendants would not bar future

cation to a class consisting of all persons domiciled in the USA, France, England and the Netherlands who purchased or otherwise acquired ordinary shares or American Depositary Shares ('ADRs') of Vivendi Universal SA between 30 October 2000 and 14 August 2002. Certification of a class consisting of German and Austrian shareholder was rejected, because the court ruled it unlikely that German or Austrian courts would recognise the US class action judgment.<sup>12</sup> The other test applied is the effects tests. This test established jurisdiction, if the conduct originating outside the USA had a substantial influence on US securities markets or US domiciled investors. Before *Morrison*, US courts assumed jurisdiction when either of these broad ranging tests were fulfilled.

The USSC in *Morrison* rejected the US court's assumptions of jurisdiction by applying the conduct test or the effects test; instead the court affirmed a presumption against extraterritoriality of US securities legislation. In effect it adopted a transactional test: the antifraud provisions in US securities legislation and, as a consequence, US federal procedural law including the class action provisions are only applicable to transactions in securities listed on a US stock exchange or otherwise securities sales in the USA.<sup>13</sup>

actions by the absent class members against the same defendants in the United Kingdom and other countries. For such an effect an opt-in procedure before the US court would be required. However, the court held that since 'the class size is only 25 members; the need for an opt-in class is one more indication that joinder is more appropriate than creation of a class. Because an "opt-in" arrangement requires class members to signify that they wish to pursue this action and will be bound by it, it is essentially joinder without any of the responsibilities and burdens that ordinarily attend personal participation: for example, paying costs and being deposed.' (*CL Alexanders Laing & CruicksBank v Goldfeld*, 127 F.R.D. 454, at 459-460).

12 242 F.R.D. 76 (21 May 2007, U.S.D.C./S.D.N.Y.) (*Vivendi III*).

13 It is noteworthy that the *Morrison* doctrine on jurisdiction in securities fraud cases is limited to securities litigation instigated by private parties. The SEC and US prosecutors have, on the basis of the amendments adopted under the Dodd-Frank Act, jurisdiction to start proceedings against violators of the Securities and Exchange Act's antifraud provisions, if the conduct within the USA significantly furthers the violation (conduct test) or the conduct originating outside the USA had a foreseeable influence on US securities markets or US investors (effects test). S. 929P(b)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, H.R. 4173) amends s. 27 of the 1934 SEA by adding at the end the following new subsection: '(b) Extraterritorial Jurisdiction.—The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this title involving— (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.'

US class actions had become an instrument for foreign investors to make use of collective action procedures that are not available in the jurisdiction of the foreign company or the place where the securities are listed.<sup>14</sup> In *Morrison*, the USSC restricted access to US court proceedings in securities fraud cases to claimants who acquired their securities on a US stock exchange respectively concludes the securities transactions in the USA.<sup>15</sup> One of the arguments brought forward by the respondents to adopt this restriction is the fact that US class action/settlement judgments would not be recognised as having preclusive effect by important jurisdictions in Europe

Non-recognition of the US judgment would lead to two undesirable situations if: a. the claimant wins the US class action or settles, but this judgment is not recognised in the foreign state where important assets of the defendant are situated; or b. the defendant wins the US class action and members of the class successfully claim before a foreign court which does not recognise and grant preclusive effect to the US class action/settlement judgment.<sup>16</sup>

As already mentioned, no convention on the recognition and enforcement of civil judgments is applicable between any of the European countries and the USA. Therefore, I will briefly describe in the following paragraphs whether the jurisdictions of the Netherlands, France, the UK and Germany recognise these class action judgments or class action settlements or, in case there is no relevant case law in this respect, the likelihood of recognition. The importance of the judgment in *Morrison* is that the US class action or class settlement mechanism is no longer available to claimants who did not acquire their securities on a US stock exchange and claimants who did not conclude their securities transaction in the USA.

14 On various occasions, US courts have assumed jurisdiction under these rules and ruled on securities class action claims initiated by US and foreign domiciled claimants against non-US companies for conduct outside the United States where the securities are not listed on a US exchange. To make their grievances regarding the wide assumption of jurisdiction by US courts known, European companies and European governments issued a brief to the USSC as *amici curiae* in support of the respondents, National Australia Bank. An overview of all briefs is available at: <<http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-1191.htm>>.

15 Affirmative to this jurisdiction rule: H.L. Buxbaum, 'Transnational Regulatory Litigation' (2006) 26 2 Va. J. Int'l L., pp. 251–317; H.L. Buxbaum, 'Multinational Class Actions under Federal Securities Law: Managing Jurisdictional Conflict' (2007) 346 1 Colum. J. Transnat'l L., pp. 14–71; S.J. Choi and L.J. Silberman, 'Transnational litigation and global securities class-action lawsuits' (2009) 2 Wis. L. Rev., pp. 465–506. Note that the restriction of access to US class actions in f-cubed cases was technically speaking not a case on jurisdiction per se, in *Morrison*, the USSC ruled against the application of US securities law to claims arising from transactions concluded outside the USA.

16 Murtagh (2011), p. 2; 24; 26. This seems to be the case in the *VEB/Deloitte*-case. This case will be discussed in paragraph 4.

However, for these claimants there may be an alternative available: claimants who acquired their securities on a European stock exchange may have access to the WCAM procedure in order to have a settlement agreement concluded with the company declared binding on all EU domiciled investors by the Amsterdam Court of Appeal.<sup>17</sup> The attractiveness of the WCAM procedure for collective settlements between companies and organisations representing investors domiciled in the EU, especially in cases of corporate misinformation, has been enhanced by the applicability of the recast Brussels I regulation.<sup>18</sup> On the basis of this European regulation on jurisdiction, recognition and enforcement of judicial decisions, the Amsterdam Court of Appeal's decision has to be recognised and granted binding effect by all courts in the European Economic Area (EU+Norway, Liechtenstein and Iceland) and Switzerland<sup>19, 20</sup>

### 3. Recognition of US class action/settlement judgment under Dutch law

According to Dutch law, judgments rendered by foreign courts not belonging to an EEA-jurisdiction, are to be recognised by a Dutch court in order to be enforceable in the Netherlands.<sup>21</sup> The conditions for recognition are not laid down in statutory provisions. On the basis of Dutch case-law, the following three elements must be fulfilled:

- (1) the jurisdiction of the foreign court is established on the basis of internationally accepted rules of jurisdiction;

17 Note that the Dutch WCAM procedure has been successfully used in securities litigation. Settlements have been reached between the parties in the securities actions in the *Dexia* case (Amsterdam Court of Appeal, 25 January 2007, ECLI:NL:GHAMS:2007:AZ7033), the *Vedior* case (Amsterdam Court of Appeal, 15 July 2007, ECLI:NL:GHAMS:2009:BJ2691), the *Vie d'Or* case (Amsterdam Court of Appeal, 29 April 2009 ECLI:NL:GHAMS:2009:BI2717), the *Shell* case (Amsterdam Court of Appeal, 29 May 2009, ECLI:NL:GHAMS:2009:BI5744) the *Converium* case (Amsterdam Court of Appeal, 17 January 2012, ECLI:NL:GHAMS:2012:BV1026) have all been endorsed and declared binding by the Amsterdam Court of Appeal, and most recently in the DSB-case (Amsterdam Court of Appeal, 4 November 2014, ECLI:NL:GHAMS:2014:4560).

18 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1 replacing Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

19 EEA-jurisdictions and Switzerland are bound by the Lugano Convention 2007 OJ L 339/3 and Lugano Convention 1988, OJ L 319/9.

20 Only 4 exceptions to recognition are available, see: art. 45 recast Brussels I regulation.

21 Sections 431 and 985 of the Dutch Code of Civile Procedure (DCCP, Wetboek van Burgerlijke Rechtsvordering).



- (2) the foreign court proceedings satisfy due process requirements; and
- (3) the foreign court's judgment satisfies Dutch public policy requirements.<sup>22</sup>

Particularly, with respect to the recognition of US class settlement approved by a final judgment, the ruling of the Amsterdam District Court in the case *Stichting Onderzoek Bedrijfsinformatie (SOBI) v Deloitte Accountants BV, Deloitte & Touche LLP & Meurs*<sup>23</sup> is important. In this case, SOBI, individually mandated by Dutch investors, sought damages from the US and Dutch accountant branches of the Deloitte Group, Deloitte Netherlands and Deloitte USA. These firms audited and certified the annual accounts of the Dutch food company Ahold and its US subsidiary US Food Service ('USF') despite its allegedly false and misleading content. The accountants challenged the Amsterdam District Court's jurisdiction on the grounds that the investors represented by SOBI are bound by the US court's final judgment<sup>24</sup> in which the settlement agreement including the choice of forum clause (before a US court) is declared binding.<sup>25</sup>

The court ruled that a US class action/settlement judgment the three above-mentioned conditions were satisfied.<sup>26</sup> The second and third conditions were deemed to be fulfilled by reference to the commonalities between the WCAM and the US class settlements<sup>27</sup>:

- 22 L. Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (10th edn, Kluwer 2012), para. 270; *T & C Burgerlijke Rechtsvordering, art. 12 Rv (Polak)*, para. 8. Section 12 Rv the Dutch *lis pendens* rule; in case a dispute has been initiated before a foreign court and the eventual decision upon this dispute is subject to recognition and execution in the Netherlands, the Dutch court who is afterwards confronted with a dispute on the same grounds and between the same parties has to suspend the proceedings until the foreign court's decision. In case of recognition and execution of the foreign court's judgment, the Dutch court has to decline jurisdiction. Cf. Amsterdam District Court in its judgment of 23 October 2013 (ECLI:NL:RBAMS:2013:7936 in the *Colima International Ltd and Stichting Fairfield Compensation Foundation v PricewaterhouseCoopers N.V. et al.*-case declining jurisdiction on the basis that the claims are already subject to the class action before a US courts against PwC Canada; the claimants participate already in the US class action procedure either as class member or as named plaintiff (para. 4.8).
- 23 Amsterdam District Court, 23 June 2010, ECLI:NL:RBAMS:2010:BM9324, *JOR* 2010, 225 with commentary from I.N. Tzankova. In the case of VEB/Deloitte (Amsterdam District Court, 26 June 2013, ECLI:NL:RBAMS:2013:4617), the court also declined Deloitte's motion to dismiss and assumed jurisdiction. This was actually based on the argument that in the US Ahold Settlement the question of Deloitte's liability vis-à-vis the Class was not dealt with.
- 24 *In re Royal Ahold N.V. Securities & Erisa Litigation*, Civ. No. 1:03-MD-01539, 437 F.Supp.2d 467 (16 June 2006, U.S.D.C./D.Md.)
- 25 Para. 6.5.1.
- 26 Para. 6.5.1.

- (1) both systems offer the possibility to, subject to conditions, bind a specific group of victims by judicial interference to a collective settlement agreement;
- (2) interested parties have the opportunity to state their opinion to the court on the contents of the settlement agreement; and
- (3) interested parties have the right to opt-out from the agreement.<sup>28</sup>

For these reasons, the Dutch court ruled that, in principle, a US class settlement can be recognised under Dutch law.<sup>29</sup> Even though the expiry period to file a claim for indemnification under the settlement in the US procedure is shorter than under the applicable section 7:907(6) Dutch Civil Code ('DCC'), the court ruled that claimants were not deprived from an adequate possibility to be informed about settlement agreement.<sup>30</sup> Furthermore, the fact that the lead plaintiffs and lead counsel for plaintiffs appointed by the US court at the start of the class action proceedings do not qualify as a *representative* foundation or association in the sense of section 7:907 DCC does not mean that the interests of the parties involved are not sufficiently satisfied.<sup>31</sup> The court concluded that, in principle, the US court's final judgment on the Ahold settlement is to be recognised. Its rulings can in principle successfully challenge SOBI's claims.

In this case, not all defendants were party to the US settlement agreement. Only Meurs, CFO of Ahold, was party to this settlement agreement; Deloitte accountants were not. However, the parties to this settlement included a choice of forum clause beneficial to Deloitte Netherlands and Deloitte USA as third parties.<sup>32</sup> Deloitte based its challenge of the international jurisdiction on section 8(2) of the Dutch Code of Civil Procedure ('DCCP') that declines international jurisdiction for a Dutch court if the litigating parties agreed on another exclusive forum. The court ruled with respect to the contracting party Meurs as well as with respect to the third parties to the agreement, i.e. Deloitte, that the binding effect of a choice of forum clause is limited to the represented investors who explicitly accepted the clause in a clear and accurate manner.<sup>33</sup>

27 See also: A.F.J.A. Leijten, 'De betekenis van de Wet collectieve afwikkeling massaschade voor corporate litigation' (2005) 176 *Ondernemingsrecht*, p. 506.

28 Para. 6.5.3.

29 Para. 6.5.6.

30 Para. 6.5.5.

31 Para. 6.5.5.

32 Para. 6.4.

33 See also with respect to WCAM: M.F. Poot, 'Internationale afwikkeling van massaschade met de Wet collectieve afwikkeling massaschade' in M. Holtzer et al. (eds), *Geschriften vanwege de Vereniging Corporate Litigation 2005–2006* (Kluwer, 2006), pp. 179–180.

Furthermore, the court ruled that only by individual consent the material parties, i.e. the investors represented by SOBI, can be barred from claiming before the court that has jurisdiction in accordance with the applicable jurisdiction rules, in this case, the court of the defendants' domicile.<sup>34</sup> Therefore, the international jurisdiction for the claim against Deloitte Netherlands is based on the defendant's domicile.<sup>35</sup>

Several remarkable aspects of the decision draw the attention. It is important to note that in this case, the Dutch court ruled upon the recognition of a US 'settlement purposes-only' agreement endorsed by a court's judgment. With respect to the recognition of a US class action judgment where the US court award damages collectively, Tzankova in her commentary to this judgment, in my opinion correctly, states that these judgments could infringe Dutch public policy.<sup>36</sup> Because of such an infringement, a Dutch court might refuse to recognise the *res judicata* effects of a US class action judgment.<sup>37</sup> Section 3:305a(3) DCC precludes a collective claim for damages.

Tzankova also regards the recognition of a US class settlement reached after class certification problematic. Class certification is one of the standing requirements in US class actions. Upon the claimant's motion to certify the class, the defendant(s) may object to whether the issues are appropriately handled as a class action and whether the claimant(s) is/are sufficiently representative of the class. However, in my opinion, such recognition of a settlement reached after certification does not necessarily violate Dutch public policy. Under Dutch law, a settlement that is concluded after a court's declaratory ruling on the defendant's liability on the basis of section 3:305a DCC can also be declared binding by the Amsterdam Court of Appeal in the WCAM procedure. The mere fact that defendants may be more inclined to settle a dispute because of the risk that a US court will award damages collectively in a class action is in my opinion insufficient. If a Dutch court declares a defendant liable in a Dutch collective action procedure, the defendants may also have an incentive to agree on a settlement because of the litigation costs and the damages awarded in the likely follow-up proceedings initiated by the investors.

In regard of the recognition of US class action judgments, it is surprising that the class action judgments of the same class against Deloitte USA and Deloitte

34 Paras 6.6.1 and 6.6.2.

35 S.2 DCCP.

36 Commentary in *JOR* 2010, 225.

37 For an overview of the claim and issue preclusive effect granted to US class action judgments or class settlement judgments by the jurisdictions of the USA, see R. Wasserman, 'Dueling Class Actions' (2000) 80 B.U.L. Rev. pp. 484–497 and R. Wasserman, 'Transnational Class Actions and Interjurisdictional Preclusion' (2011) 86 Notre Dame L. Rev. pp. 318–331.

Netherlands were not an issue in these proceedings before the District Court. By its decisions of 21 December 2004 and 18 June 2007, the US District Court denied any wrongdoing by Deloitte on the basis of US law.<sup>38</sup> This judgment was affirmed by the US Court of Appeals on 5 January 2009.<sup>39</sup> In accordance with the rules of civil procedure, the question of (international) jurisdiction has to be dealt with before the question of binding effect of a foreign judgment involving the same cause of action and between the same parties can be answered. If the latter question is answered affirmatively, the court has to declare the claim inadmissible. In such a case the (third) preliminary question on applicable law remains unanswered.

However, in the *VEB/Deloitte*-case of 26 June 2013, the Amsterdam District Court seems to mix up these separate questions of private international law: (1) international jurisdiction; (2) binding effect and (3) applicable law:

*“The question whether the Deloitte Partnership is liable to the Class, was not dealt with at all in the Settlement Agreement and the Final Judgment. In regard to that question the Class has proceeded against the Deloitte Partnership and Deloitte USA in separate proceedings in the United States which resulted in the abovementioned judgments. At the moment the Settlement Agreement was concluded and the Final Judgment was given, the position of the Deloitte Partnership and Deloitte USA vis-à-vis the Class was dealt with in those separate proceedings. It must be noted that those proceedings were limited to the question whether Deloitte on the basis of US law could be liable to the Class.*

*The claims of VEB in the current proceedings regard the question whether, and to what extent, Deloitte (including the Deloitte Partnership), according to Dutch law is liable to the Class.”*<sup>40</sup>

The court answers the question of international jurisdiction affirmatively. Essentially, it argues as follows: the dispute between the same parties and on the same facts and cause of action has to be answered according to Dutch law, consequently the Dutch court has international jurisdiction. From private international law perspective, this reasoning seems illogic. The question of jurisdiction and recognition are different from the question of applicable law. Hence, it is wrong for a court to rule affirmatively on its jurisdiction and decline the binding effect of a foreign judgment between the same parties and based on the facts and cause of action simply because different laws are applicable to the dispute.

To conclude, even though the ruling on recognition in the *SOBIDeloitte* and *VEB/Deloitte* cases have been delivered by a District Court and not (yet) ruled upon by a Court of Appeal or the Dutch Supreme Court, it can be concluded

38 *In re Royal Ahold N.V. Securities & ERISA Litig.*, 351 F.Supp.2d 334 (D. Md. 2004); *In re Royal Ahold N.V. Securities & ERISA Litig.*, CIVIL NO. 1:03-MD-1539, 18 June 2007.

39 *Public Employees’ Retirement Association of Colorado v. Deloitte & Touche LLP*, 551 F.3d 305 (C.A. 4 (Md.) 2009).

40 Paras 4.4.4–4.4.5.

that Dutch courts seem likely to recognise US class action/settlement judgments. The condition for recognition seems to be that the protection afforded to absent third parties is similar to the protection afforded by the WCAM.

#### 4. Recognition of US class action judgments and settlements under French law

French courts have not yet ruled upon the recognition of the *res judicata* effect of a US class action/settlement judgment directly. Despite the lack of case-law in regard of recognition of a US class action/settlement judgment by a French court, judge Marrero in the US class action certification procedure<sup>41</sup> against the French company Alstom for allegedly inflating the price of its securities by making materially false and misleading statements rejected the certification of a class including Alstom's shareholders domiciled in France.<sup>42</sup> The claimants requested the court to certify a class comprising of all persons who acquired Alstom shares in the USA and all US, Canadian, French, English and Dutch investors acquiring Alstom shares on foreign markets between 3 August 1999 and 12 August 2003. Judge Marrero ruled that the claimants could not establish superiority, because they had insufficiently demonstrated that French courts would more likely than not recognise and give preclusive effect to any judgment of the US court involving absent French class members.

Since France and the USA are not party to any bilateral or multilateral convention regarding the mutual recognition and enforcement of judgments, the conditions in this regard are laid down in the judgment of the French Supreme Court on 7 January 1964 in the *Munzer* case. The conditions for recognition are the following:

- (1) the judgment of the foreign court is neither procedurally nor substantially contrary to international public policy (the "Public Policy Condition")<sup>43</sup>;
- (2) the foreign court must have jurisdiction pursuant to French rules on conflict of jurisdictions (the "Jurisdictional Condition")<sup>44</sup>; and

41 *In re Alstom S.A. Securities Litigation*, No. 03 Civ. 6595, 253 F.R.D. 266 (26 August 2008, U.S.D.C./S.D.N.Y.).

42 Notice that judge Marrero applied in its decision of 14 September 2010 the *Morrison*-doctrine adopted by the U.S.S.C. and as a result dismissed the securities fraud claims of plaintiffs who purchased securities on a French stock exchange. No. 03 Civ. 6595 (VM), 2010 WL 3718863 (14 September 2010, U.S.D.C./S.D.N.Y.).

43 French courts may not recognise or give a foreign court's judgment preclusive effect if it offends French public policy so as to breach one of the most fundamental principles of the French legal order.

44 The French Supreme Court (First Civil Chamber) ruled in its decision of 20 February 2007 (No. 05-14.082) in the *Cornelissen v Société Aviance Inc et al.* - case that French courts no longer need to verify whether the foreign court established its jurisdiction in

(3) the action before the foreign court was not the result of forum shopping (the “Forum Shopping Condition”)<sup>45</sup>.

The public policy condition is the biggest hurdle to recognise US class action/settlement judgments. Especially the opt-out character of these judgments might infringe French public policy.

Where the court in *Vivendi* found that a US opt-out class action would not violate French public policy because, at least in part, there was at that time an ongoing debate in legal and business sectors regarding the possibility of adopting an (opt-in/opt-out) collective action model in French law<sup>46</sup>, the court in *Alstom* referred to the recent developments in this respect and concluded that recognition by a French court is not likely. By law of 17 March 2014, the French legislator promulgated the new *action de groupe* proceedings.<sup>47</sup> At the

accordance with French conflict of law rules. In order to meet the jurisdictional condition, the French court has to verify whether (1) the case does not fall within the exclusive jurisdiction of a French Court (“Exclusive Jurisdiction”) for an overview of matters in which French courts are deemed to have exclusive jurisdiction: D. 2006, chronicle of B. Audit, p. 1846; (2) there exists a characterized link, substantive connection, between the case and the foreign court (“Characterised Link”) (condition laid down in French Supreme Court (First Civil Chamber) decision of 6 February 1985 in the *Simitch* case, (Bull. civ. 1985, I, No. 55; commentary on this case in P. Francescakis, *Le contrôle de la compétence du juge étranger après l’arrêt “Simitch” de la Cour de cassation*’ (1985) 74 (2) *Rev.crit.dr.int.pr.*, pp. 243–272 (1985), p. 243 *et seq.*. Before the French Supreme Court’s decision of 23 May 2006 in the *Prieur v A.-D. de Montenach* case (Bull. civ. 2006, I, No. 254; JCP G 2006, II (30), § 10134, p. 1522 *et seq.* with commentary from P. Callé), defendants could invoke their French nationality on the basis of s. 15 FCC in order to oppose recognition of the foreign court’s judgment. On 22 May 2007, the French Supreme Court affirmed its ruling in *Prieur* by applying that ruling to a U.S. court’s judgment in the *Époux Schlenszka v Société Fontaine Pajot et al.* case (Bull. civ. 2007, I, No. 196). On the same day, the French Supreme Court ruled in the *Banque de développement local v Société Ferrométal* case (Bull. civ. 2007, I, No. 195; *Rev.crit.dr.int.pr.* 2007, 96 (3), p. 610 *et seq.* with commentary from H. Gaudemet-Tallon; JDI 2007 134 (3), p. 956 *et seq.* with commentary from B. Ancel et H. Muir Watt) that S. 14 FCC does not require claimants with French nationality to bring their claim against a foreign defendant before a French court; the application of this section is merely optional for the claimant.

45 This condition was also formulated by the French Supreme Court in the *Simitch*-case: the choice of the foreign court must not be fraudulent, i.e. the claimants must not have obtained the foreign judgment by manufacturing jurisdiction for its case so as to be able to choose for a more favorable forum when instead French law should have applied.

46 For an overview of these Bills, see Arons (2011), p. 253–258.

47 Loi N° 2014–344 du 18 mars 2014 relative à la consommation, JORF n° 0065 du 18 mars 2014, p. 54. This Act is similar in its scope of application and three-stage feature to the Belgian Act of 28 March 2014 (Belgisch Staatsblad/Moniteur Belge 29 april/avril 2014 35201), adding a procedure of collective redress to the Belgian Code of Economic Law (*Wetboek van economisch recht/Code de droit économique*). Unlike the French collec-

first stage, a representative organisation may bring proceedings before the court requesting the court to rule whether the defendant company caused losses towards a group of consumers by selling products or delivering services.<sup>48</sup> In this judgment, the court will also lay down the criteria for compensation of the (classes of) consumers. Secondly, if the (highest) court rules positively that this is the case, the court will set a term between two and six month for consumers to adhere to the group (opt-in).<sup>49</sup> At the third stage, the representative organisation will by way of mandate claim compensation for these group members. This organisation will receive the compensation paid and is bound to transfer these sums to the individual group members in accordance with the court judgment.<sup>50</sup>

Furthermore, Judge Marrero based his decision on the likelihood of recognition amongst others on the recent case law of the French Constitutional Court (*Conseil Constitutionnel*). On 16 August 2007, the French Constitutional Court rendered a decision upholding the right of French trade unions to call a strike on behalf of its members. However, the constitutional court rejected the union's right to start legal actions on behalf of its members without the latter giving individual consent with full knowledge ('*donner son assentiment en pleine connaissance de cause*') based on sufficient and personalised information.<sup>51</sup> More-

tive proceedings where the group members have explicitly to adhere to a settlement agreed by the defendant and the representative organisation and homologated by the court in order to have binding effect to them (Art. 423-6 of the French Consumer Code), the consumers in the Belgian collective proceedings adhering to the collective proceedings at the first stage after the court ruled positively on standing of the representative organisation are bound by the settlement agreed to by the representative organisation and the defendant during the collective court proceedings and homologated by the Belgian court (Art. XVII. 38 § 1(2) jo. Art. XVII. 42 § 2(7) jo. Art. XVII. 49 § 4 of the Belgian Code of Economic Law). For an in depth analysis, I refer to: S. Voet & B. Allemeersch, 'De rechtsvordering tot collectief herstel: een Belgische class action voor consumenten', *Rechtskundig Weekblad* 2014–15, p. 643–661.

48 Art. L. 423-1 jo. Art. 423-3 of the French Consumer Code (*code de la consommation*).

49 Art. L. 423-5 of the French Consumer Code. Please note that in case the identity and number of affected consumers are known at the first stage and the consumers suffered the same monetary amount as a loss, losses identical by delivered service, or losses identical by reference to the period or duration of losses sustained, the court may immediately after ruling on the toriousness order the defendant to pay damages directly and individually to these group members (art. L. 423-10 of the French Consumer Code).

50 Art. L. 423-5 jo. Art. L. 423-6 jo. 423-11 jo. 423-3 of the French Consumer Code.

51 Les cahiers du Conseil Constitutionnel, No. 23/2007, p. 22. Pinna concludes from this judgment that, in principle, the opt-out character of US class action judgments/settlements is not an obstacle to its recognition under French law, it is the lack of proper notification of the absent French class members that may induce the court to decline recognition on the basis of a violation of the French legal order. See A. Pinna, 'Les groups internationaux des sociétés face aux *class action* américaines' in X. Boucobza

over, the members have the right to withdraw from any legal proceedings at any time. In this respect, the court referred to its ruling of 25 July 1989 in a case involving a challenge to the constitutionality of a French law authorising trade unions to bring legal proceedings on behalf of individual members.<sup>52</sup>

Even though French courts have not yet ruled affirmatively on the recognition of US class action decisions, it is important to note that in regard of the jurisdictional and forum shopping condition, the Paris District Court dismissed the claims initiated by Vivendi against two French shareholders and the French investors association ADAM<sup>53</sup>. In these proceedings Vivendi demand compensation for the costs of the US court proceedings and an injunction ordering the defendants to stop the US class actions under the threat of a financial penalty of EUR 50.000 per day. The grounds brought forward by Vivendi to support its claims were the following:

- (1) that a French court was the ‘natural judge’ of a case involving a French company and a majority of French shareholders (Vivendi alleged that 40 per cent of the shareholders were French and that these shareholders held 75 per cent of Vivendi’s shares;
- (2) that, even though they may be entitled to sue both in a US court and a French court, the defendants had abused their right by suing before a US court for the sole purpose of preventing the natural judge of the dispute from deciding the case;
- (3) that the defendants were abusing their right to initiate proceedings before a US court because they would not bear the consequences of the proceedings if they lose the case because the lawyers’ fees are calculated on the basis of ‘no cure no pay’. Furthermore, the defendants are able to bring new proceedings with a similar claim before a French court because of the alleged non-recognition by French courts of the US court’s judgment and hence a denial of the res judicata effect of the US court’s judgment.<sup>54</sup>

and G. Mecarelli (eds), *Groupes internationaux de sociétés: nouveaux défis, nouveaux dangers* (Economica 2007) and A. Pinna, ‘Recognition and Res Judicata of U.S. Class Action Judgments in European Legal Systems’ (2008) 12 Erasmus Law Review, pp. 39–40 and pp. 48–49. On the contrary, Guinchard regards this judgment not as an obstacle to adopt in French law a collective action procedure based on an opt-out model. See S. Guinchard, ‘Entre identité nationale et universalisme du droit: l’idée et le processus d’introduction d’un recours collectif en droit français’ in J.-P. Ancel et al. (eds), *Vers de nouveaux équilibres entre ordres juridiques, Liber Amicorum Hélène Gaudemet-Tallon* (Dalloz 2005), pp. 2183–2184.

52 Decision No. 89–257.

53 *Association de défense des actionnaires minoritaires*.

54 Vivendi’s claim was supported by French legal scholars: Professor D. Cohen argued in an academic article that French courts were indeed the natural forum for this dispute on



In its judgment of 13 January 2010<sup>55</sup>, the Paris District Court dismissed Vivendi's claims. This court did not address the issue of whether French courts have the power to issue anti-suit injunctions. The court merely held that the right to initiate proceedings (*le droit d'agir en justice*) is a fundamental right that cannot constitute an abuse giving a right to compensation on the basis of section 1382 of the French Civil Code, unless the initiation of proceedings is malicious, in bad faith or grossly mistaken. On the facts of the case, the court ruled that no such abuse could be found.

First of all, the case was connected to the USA, because Vivendi's directors had acted in the USA and, therefore it was legitimate for the French shareholders to opt for proceedings against the defendants before a US court. Secondly, the court held that it is inappropriate to characterise the claimant's conduct as abuse of forum shopping because the court should not rule, in advance and outside *exequatur* proceedings, upon the connectivity of the case to the foreign court seised. Moreover, the court should not rule at this stage, the class certification judgment was not yet delivered, on the conformity of a foreign court's judgment with French international public order provisions. Furthermore, the fact that a French court could rule, when requested to, that the judgment is not in conformity with French public order requirements despite the possibility offered to every shareholder to withdraw from the class action proceedings by using the opt-out procedure drawn to their attention by effective publicity, should not in any case characterise the exercise of the right to initiate proceedings as abuse, because the US court's judgment that is supposed to be favourable to Vivendi's shareholders could be enforced first of all in the United States.

The Paris Court of Appeal upheld this judgment in its decision of 28 April 2010.<sup>56</sup> This Court ruled first of all that on the basis of the Brussels I

the basis of s. 14 FCC. As a consequence, Vivendi's shareholders had abused their right by bringing an action before US courts. French courts should not become second rank fora and that the French legal order should oppose the American judicial interference in foreign disputes by issuing an anti-suit injunction in the *Vivendi* case. In his opinion, the Paris Court of Appeal had a great opportunity to convey this message to the US courts. See: D. Cohen, 'Contentieux d'affaires et abus de forum shopping', (2010) 16 D. 16, pp. 975–983.

55 Paris District Court (First Chamber, First Section, No. 6), 13 January 2010 (*Vivendi v Gérard*) Case No.09/15408.

56 Paris Court of Appeal (Second Chamber), 28 April 2010 (*Vivendi v Gérard*) Dr. soc. 2010 (10) § 185, p. 24 *et seq.* with commentary from R. Mortier. Couret and Dondero support the arguments of the court to dismiss the claim. In particular, these authors support the court's statement that a French court cannot rule upon a possible refusal to grant *exequatur*, before any US court has rendered its judgment. See: A. Couret and B. Dondero, 'Mettre en échec la participation à une class action américaine devant le

regulation, Vivendi cannot only be sued before the courts where it is domiciled, i.e. in France, but equally before the courts of the place where the damage is sustained or the place where the harmful event took place. Therefore, Vivendi was wrong in its statement that the claim should have been brought before the French court as natural judge, because there is no hierarchy between the different competent forums. Furthermore, the court rules that there are sufficient serious links between the dispute and the U.S. court and that there is no fraudulent manoeuvre to create competence for the U.S. court. Such fraud cannot be construed from the fact alone that the claimants sought to obtain jurisdiction of a US court so as to get recognition of their right of compensation under more favourable conditions. Furthermore, the court considers that Vivendi cannot characterise the abuse of forum shopping that it denounces on the ground that the US court's judgment is not likely to be recognised in France even though the actual assessment of a possible contradiction of this court's judgment with French international public policy, assuming that it constitutes such an abuse cannot be raised in the absence of a judgment on the merits of the dispute made until today.

From these judgments, it can be concluded that the French shareholders participating in a US class action against a French company cannot be held liable for abuse of forum shopping if they pursue a class action claim before a US court if the tortious act was committed in the USA. Furthermore, French courts are not willing to issue an anti-suit injunction on the ground that a US court's judgment might not be recognised under French law. Whether US class action/settlement judgments are to be recognised under French law, there is no French case law yet. Despite the fact that the French legislator introduced a French (opt-in) collective redress procedure early 2014<sup>57</sup>, it seems very likely that French courts are not willing to recognise the binding effect of a US class action/settlement judgment against absent class members who were not individually notified in regard of these US proceedings.<sup>58</sup>

##### *5. Recognition of US class action judgments and settlements under English law*

Since there is no treaty on the mutual recognition of judgments between the UK and the USA, the question of recognition has to be solved on the basis of

juge français? (à propos de l'arrêt Vivendi, CA Paris, 28 avril 2010)', (2010) 5 § 104 Bull. Joly Soc., pp. 514–515.

57 Loi n° 2014-344 du 17 mars 2014 relative à la consommation, JORF 2014/65, 18 mars 2014, n° 2, p. 5400.

58 Otherwise: M. Matousekova, 'Would French Courts Enforce U.S. Class Actions Judgments' (2006) 11 *Contratto e impresa/Europa* 11, pp. 651–676.

UK statutory law and common law case law.<sup>59</sup> English courts have not yet directly ruled upon the question of recognising and granting res judicata effect to a US class action/settlement judgment or a US court approved class settlement judgment. Only in the *obiter dictum* of the *Campos v Kentucky & Ind. Terminal Ry*<sup>60</sup> case, an English court dealt with the issue of recognition. In this case, the defendant pleaded that the plaintiff's claim had already been decided, because the plaintiff fell within the plaintiff class of a US court's judgment. Judge McNair held that even assuming that the class action gave valid support for a plea of res judicata in a US court against an absent member of the class, the defendant's plea of res judicata would fail, because English private international law would not permit a foreign judgment to give rise to such a plea in the English courts 'unless the party alleged to be bound had been served with the process which led to the foreign judgment'.<sup>61</sup>

In general three requirements have to be met in order to have the foreign judgment recognised:

- (1) the foreign court must have jurisdiction, according to the English rules of conflict of laws, both over the parties and over the subject-matter;
- (2) the decision must be final and conclusive on the merits; and
- (3) no defences to recognition are available.<sup>62</sup>

Under English law it is required that the US court had jurisdiction over the defendant as well as the (absent) English class members. Therefore some degree of presence of the defendant is required in the USA; the fact that the company offered its securities in the USA will be deemed sufficient presence. The question of jurisdiction over the (absent) English class members will be dealt with under the requirement that no defences to recognition are available. Most class action/settlement judgments are final and conclusive decision on the merits of the case. Therefore, it is very likely that the second requirement is met.<sup>63</sup>

59 S. 34 of the Civil Jurisdiction and Judgments Act 1982: "No proceedings may be brought by a person in England and Wales or Northern Ireland on a cause of action in respect of which a judgment has been given in his favour in proceedings between the same parties, or their privies, in a court in another part of the United Kingdom or in a court of an overseas country, unless that judgment is not enforceable or entitled to recognition in England and Wales or, as the case may be, in Northern Ireland."

60 [1962] 2 Lloyd's Rep. 459, p. 473 (QB)

61 Also: J.C.L. Dixon, 'The Res Judicata Effect in England of a US Class Action Settlement' (1997) 46 Int'l & Comp. L.Q., p. 140.

62 *Dicey, Morris and Collins on the Conflict of Laws* (14th edn Sweet & Maxwell 2006), Vol. 2, Rule 35; A. Briggs, *The Conflict of Laws* (2nd edn Oxford University Press 2008), p. 136.

63 See: R. Mulheron, 'The Recognition, and Res Judicata Effect, of a United States Class

Furthermore, an English court will not enforce, as a matter of public policy, a foreign judgment, if it was obtained in circumstances opposed to natural justice. In *Jacobson v Frachon*<sup>64</sup>, the English Court of Appeal *per* Lord Justice Atkin ruled that: '[t]hose principles seem to me to involve this, first of all the court being a court of competent jurisdiction, has given notice to the litigant that they are about to proceed to determine the rights between him and the other litigant, the other is that having given him that notice, it does afford him an opportunity of substantially presenting his case before the court.' Similarly, Lord Hanworth MR in this case ruled: 'I am inclined to agree with the view [...] that the question of natural justice is almost, if not entirely, comprised in considering whether there has been an opportunity of having had a hearing, and whether the procedure of the court has been in accordance with the instincts of justice whereby both parties are to be given a full opportunity of being heard.'

From these rulings suggest that US class action judgments and class settlement judgments meet the English law requirements of natural justice upon the conditions that class members are given notice, have an opportunity to be heard and to opt out of the settlement.<sup>65</sup> Another ruling setting forth these conditions for recognition of a US class settlement approved by the court is a consideration of the English Court of Appeal in *Adams v Cape Industries plc*<sup>66</sup>. In this case, an English company and some of its subsidiaries were defendants in proceedings before a US court. Cape refused to take part in the proceedings against them because in their opinion the US court lacked jurisdiction. The plaintiffs gave notice to Cape that there would be a hearing to determine their application for entry of a default judgment. Cape ignored this notice and the US court entered the default judgment. This judgment was found by the English Court of Appeal to offend natural justice, because the US court entered the default judgment without holding a hearing as required by the US federal rules of procedure: '[w]hen the claim is for unliquidated damages for tortious wrong, such as personal injury, both our system and the federal system of the United States require, if there is no agreement between the parties, judicial assessment. That means that the extent of the defendant's obligation is to be assessed objectively by the independent judge upon proof by the plaintiff of the relevant facts.' Furthermore, the Court of Appeal held

Actions Judgment in England: A Rebuttal of Vivendi' (2012 75(2) MLR pp. 130–211, p. 192–193.

64 (1927) 138 L.T. 386 (CA).

65 See also: Dixon (1997), p. 148; J.J. Fawcett and J.M. Carruthers, *Cheshire, North and Fawcett Private International Law* (14th edn Oxford University Press 2008), p. 564; M. Stiggelbout, 'The Recognition in England and Wales of United States Judgments in Class Actions' (2011) 52(2) Harv. Int'l L.J., p. 470.

66 [1990] Ch. 433.

that the approach adopted by the US court was more ‘appropriate to a settlement negotiated between both the plaintiffs and defendants with the intervention of the judge’.

The finding that a US class settlement is in accordance with natural justice is also endorsed by the fact that the court, irrespective of the ability of a class member with notice to take measures to protect his own interest in the final judgment, is under an obligation to protect the interests of absent class members when deciding to declare the settlement binding. Another argument in favour of recognition is the fact that the English Civil Procedure Rules provide for an opt-out representative action where absent parties are bound the court’s judgment.<sup>67</sup> It must be noted that the scope of the English representative action is considerably narrower than in US class actions. However, the point is that English law recognises the possibility of courts to bind absent parties by their judgment under the condition that the court protects the interests of the latter.

Concluding, it is unlikely that a US class settlement approved by a competent US court is ruled to be inconsistent with natural justice or contrary to English public policy if the class members domiciled in the UK are adequately given notice of the proceedings, have an opportunity to be heard and the possibility to opt out.<sup>68</sup> Because of this recognition, claimants who not actively participated in the US proceedings are nonetheless barred from claiming (additional) damages by section 34 of the Civil Jurisdiction and Judgments Act 1982.<sup>69</sup>

#### 6. Recognition of US class action judgments and settlements under German law

There is also no judgment yet by a German court in regard of the recognition of a US class action/settlement judgment. In section 328 of the German Code of Civil Procedure<sup>70</sup> the conditions can be found when German courts have to decline recognition of a foreign court’s judgment.

In regard of class action/settlement judgments it is most likely that recognition will be declined on the basis that the contents of the judgment infringes the German public order.<sup>71</sup> Another possible ground for non-recognition may be that the German court deems that the US class court had no jurisdic-

67 Rule 19.6 Civil Procedure Rules. See: Mulheron (2012), p. 195.

68 See also: J. Harris, ‘The Recognition and Enforcement of US Class Action Judgments in England’ (2006) 11 *Contratto e impresa/Europa*, pp. 617–650; R. Mulheron (2012), p. 209.

69 See also: Stiggelbout (2011), pp. 474–475.

70 *Zivilprozessordnung*, ZPO.

71 § 328(1)(4) ZPO.

tion.<sup>72</sup> This could be the case in the aforementioned f-cubed securities class actions against a German issuing company listed on non-US stock exchange. Under the *Morrison*-doctrine, US court may only accept jurisdictions against a foreign defendant if it has some presence on US capital markets either by listing or by selling securities. One of the major arguments against recognition of US class action judgment in securities litigation against German defendant companies is the fact that US courts would lack jurisdiction over these defendants because on the basis of section 32b(1) of the German Code of Civil Procedure the courts where the German company's seat is situated has the exclusive competence<sup>73</sup> to hear damage claims based on false or misleading capital markets information, i.e. corporate misinformation cases.<sup>74</sup> Another obstacle may arise when the ruling on a matter dealt with in the US class action is inconsistent with an earlier German or foreign judgment which would be itself recognised in Germany.<sup>75</sup>

It is important to mention that the mere fact that class actions are collective actions does not violate German public policy.<sup>76</sup> However, German legal doctrine regards the right of citizens to be heard and to participate in legal proceedings, enshrined in article 103 of the German Basic Law, as part of German public policy requirements.<sup>77</sup> According to the legal doctrine, German public policy requires that at least the following conditions are met: 1. the actual possibility for absent class members to participate in the class action; 2. the possibility to opt out from these class actions proceedings; and 3. the possibility to opt out from a class settlement.<sup>78</sup>

72 § 328(1)(1) ZPO.

73 Irrespective of the degree of connection to the US court, the German court has to refuse recognition because the court at the defendant's seat has the exclusive jurisdiction provision. The German government expressly wanted to protect German companies from undue forum shopping by claimants before US courts by channelling all capital market claims against German defendants to German courts. See: Bill and explanatory note to the Capital Markets Model Case Act (*Entwurf und Begründung eines Gesetzes zur Einführung von Kapitalanleger-Musterverfahren*) (BT-Drs. 15/5091), p. 17; Recommendations and Report of the Bundestag's Committee of Legal Matters (*Beschlussempfehlung und Bericht des Rechtsausschusses v. 15. 6. 2005*, BT-Drs. 15/5695), p. 25.

74 See: M. Bälz and F. Blobel, 'Collective Litigation German Style: The Act on Model Proceedings in Capital Market Disputes' in E. Gottschalk et al (eds), *Conflict of Laws in a Globalized World* (Cambridge University Press, 2007), p. 143.

75 § 328(1)(3) ZPO.

76 Musielak ZPO § 328 Rn. 27; P. Mankowski, 'Crossing the Rhine – On the enforceability of U.S. Class Actions Judgments and Settlements in Germany' (2007) 12 *Contratto e impresa/Europa*, p. 629.

77 MünchKommZPO/Gottwald § 328 Rn. 176; Musielak ZPO/Stadler ZPO § 328 Rn. 26-27; BeckOK ZPO/Bach § 328 Rn. 59.

78 MünchKommZPO/Gottwald § 328 Rn. 176; Musielak ZPO/Stadler ZPO § 328 Rn. 26-27; BeckOK ZPO/Bach § 328 Rn. 59.

These conditions are due process requirements. They could be satisfied by measures that reasonably give notice to absent class members of their right to opt out of a US class action/settlement and pursue their individual claim.<sup>79</sup> Therefore, it is unlikely that German courts will accept the *res judicata* effect of a US class action/settlement judgment against a class member who, despite the effort of widespread dissemination of this notice, asserts that he was unaware of the US court proceedings and the defendant cannot give evidence that this claimant did in fact receive actual notice.<sup>80</sup> These due process requirements may be satisfied by the actual provision of notice by the representative claimant and/or defendant to the members of the class. This could be done by sending a letter with acknowledgement of receipt, is needed to satisfy the requirement that the defendant is properly served with the initiating writ.

Indeed, the opt-out character of the US class action/settlement judgment is the most important impediment to recognition. The Capital Markets Model Case Act provides for collective proceedings against a defendant company for violation of capital markets law.<sup>81</sup> The Act is clearly based on an opt-in model. Furthermore, no absent class members are bound by the model case judgment.<sup>82</sup> Only investors that brought a similar claim before a German court against the same defendant are bound by the model case judgment. The renewed Capital Markets Model Case Act provides in section 23 that a settlement approved by the Higher Regional Court<sup>83</sup> has *res judicata* effect against all claimants, whose cases are pending as a result of the model case proceedings.<sup>84</sup> Claimants are required to opt out from this settlement within

79 Mankowski (2007), p. 626 referring to the German Constitutional Court's judgment (*Bundesverfassungsgericht*) of 11 July 1984, *BVerfGE* 67, p. 212 that the mere opportunity to intervene in given proceedings on the basis of information provided is entirely insufficient to safeguard the right to a fair trial and a legal hearing.

80 MünchKommZPO/Gottwald § 328 Rn. 176; Mankowski (2007), p. 638.

81 *Kapitalanleger-Musterverfahrensgesetz*, KapMuG. After 5 years, the 2005 Act would automatically be repealed. On 19 October 2012, the Act was renewed. (BGBl. I S. 2182). See for an indepth analysis of the reform act: J. Wigand, 'Zur Reform des Kapitalanleger-Musterverfahrensgesetzes (KapMuG)' (2012) 23, p. 845–856. Please note that as a reaction to the Volkswagen diesel engine affaire, the German Department of Justice announced that early 2016 the Government will publish a draft Bill on Model Case Act with general application, i.e. not limited to capital markets law. Quote from Ulrich Kelber, Parlamentarischer Staatssekretär beim Bundesminister der Justiz und für Verbraucherschutz mit dem Arbeitsschwerpunkt Verbraucherschutz. Handelsblatt 26 September 2015.

82 § 22(1) KapMuG.

83 *Oberlandesgericht*, OLG.

84 For an overview of the impact of this renewal of the Capital Market Model Case Act, I refer to A. Stadler, 'Developments in Collective Redress: What's New in the 'New German KapMuG' (2013) 24 (6) EBLR, pp. 731–749.

one month after the settlement has been serviced to them.<sup>85</sup> Despite this opt out element, the German model case proceedings are clearly based on the opt-in mechanism. Only the claimants who brought their case before a German court may be bound by the model case judgment of model case settlement. Unlike in US class actions, class members who brought no proceedings against the common defendant are neither bound by the model case judgment nor by the court-approved settlement.

Concluding, German courts are not likely to recognise US class action/class settlement judgments, unless the defendant in the class action claims and upon challenge proves that the individual claimant actually received notice of the class action proceedings. The opt out element in the German model case proceedings are no justification to dismiss this principle of German public order, guaranteed by its basic law.

### *7. Recognition under EU law*

Judgments rendered by a court in a Member State have to be recognised by courts in all EU Member States.<sup>86</sup> It has widely been argued and accepted that court judgments or settlements in collective proceedings are to be recognised under the Brussels I regulation as well.<sup>87</sup> In this paragraph I will discuss the recognition issue in regard of third State court judgments or settlements. The currently applicable Brussels I regulation does not contain many provisions to solve jurisdiction, *lis pendens* and recognition problems arising in relation to court proceedings and judgments from non-EU states (third states). However, it provides on the basis of Article 45 of the recast Brussels I regulation the court of a Member State is bound to refuse recognition of another Member State's judgment if that judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.<sup>88</sup> Therefore, Dutch and English courts, unlike the French and German, may refuse to recognise a judgment rendered by another Member State's court in proceedings involving matters and parties which are bound by the US class action/settlement judgment, because these US judgments are recognised under its respective laws.<sup>89</sup> In this way assets of the party who is confronted with claims settled under the binding agreement remain protected in the Dutch and

85 S. 19(2) KapMuG.

86 Art. 32 Brussels I regulation/Art. 36 recast Brussels I regulation.

87 See footnote 7.

88 Art. 34 sub 4 Brussels I regulation/Art. 45(1)(d) recast Brussels I regulation.

89 Since the Netherlands, the UK, France nor Germany have concluded a bilateral con-



UK jurisdiction. Unfortunately, this divergence in treatment of US class action/settlement judgment will also remain under the recast Brussels I regulation.<sup>90</sup> This recast regulation entered into force as of 10 January 2015.<sup>91</sup>

However, under the new Brussels I regime, Dutch and UK courts are enabled to stay proceedings if it is seized of an action involving the same cause of action and between the same parties as in proceedings pending before a court of a third State. The following conditions have to be fulfilled: (a) the court of the third State is expected to give a judgment capable of recognition and/or of enforcement in the Member State of the court addressed, and (b) the latter court is satisfied that this stay is necessary for the proper administration of justice.<sup>92</sup> If the court in the third State have already been concluded, the court addressed will dismiss the proceedings.<sup>93</sup> The possibility – clearly not a duty – to stay or dismiss proceedings is granted as well when the proceedings in the third state are related to the action brought before the Member State's court.<sup>94</sup>

Concluding, under the current and future Brussels I regulation the issue of recognition of third State (class action/settlement) judgments is not harmonised. The conclusions drawn in the previous paragraphs in this regard remain important under the new Brussels I regime as well. The future Brussels I regulation allow courts in Member States recognising US class action/settlement judgments, like the Dutch and UK courts, to stay/dismiss proceedings if the applicant's claim brought before them is subject to US class action/settlement proceedings/judgment.

## 8. Concluding remarks

Between the USA and the EU or European jurisdictions there is no convention on recognition of judgments in civil or commercial matters applicable. Therefore, the question of recognition of US class action/settlement judgments has to be answered by applying national legislation and/or case-law. In this article, I restricted my research to the recognition of these judgments under Dutch, French, English and German law. These jurisdictions essentially

vention regarding recognition of judgments in civil matters with the USA, the exception of Art. 72 Brussels I regulation/Art. 73(3) recast Brussels I regulation does not apply.

90 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.

91 Art. 81 recast Brussels I regulation.

92 Art. 33(1) recast Brussels I regulation.

93 Art. 33(3) recast Brussels I regulation.

94 Art. 34 recast Brussels I regulation.

require the same conditions to be met in order to recognise a US class action/settlement judgment: (1) the US courts must have had jurisdiction; (2) the class must have been properly notified; (3) opt-out settlements must not be manifestly against public policy; and (4) the right to opt out must have been effective in the sense that interested parties are sufficiently informed. Especially the opt-out characteristic of US collective actions/settlements causes difficulties. Absent class members, domiciled in Europe, may be bound by settlements reached between the alleged tortfeasor and a court-appointed lead plaintiff if the settlement is granted approval by a US court. These absent class members are bound unless they explicitly opt out.

Recognition will follow by granting preclusive effects to these US class action/settlement judgments. The preclusive effect prevents re-litigation of the same claims before courts in Europe. It is expected that courts in the Netherlands and the UK will recognise US class action/settlement judgments and grant preclusive effect if these conditions are met. Especially since these jurisdictions (recently) allow for a similar binding effect in regard of absent interested parties. Besides the Dutch WCAM and the English representative actions, the German legislator's recently introduced a court-approved settlement in its Capital Market Model Case proceedings and the French legislator – after multiple bills failing in Parliament – enacted group proceedings (*action de groupe*). The Capital Market Model Case proceedings are the most prominent opt-in model among these jurisdictions; only claims individually brought before the courts are subject to the Higher Regional Court's ruling on the common questions of law or fact and/or approval of the settlement agreed between the model plaintiff and model defendant. At the first stage in the French group proceedings a representative organisation will bring the claim against a common defendant on behalf of an unidentified group of alleged victims. After the court rules on the tortiousness of this defendant's behaviour, the individual claimants have to request compensation. Even though these proceedings are therefore based on the opt-in model, the French Constitutional Court allowed for opt out proceedings as long as interested parties who are bound by the decision are duly notified of the possibility to opt out. In principle, public policy exceptions are therefore not a fundamental problem for recognition of US class action/settlement judgments. However, it is not to very likely that French courts will recognise a US class action/settlement judgment and for those reasons dismiss a French claimant's individual proceedings against the defendant company.

In regard of the question of recognition of a third State judgment under the Brussels I regulation on jurisdiction, *lis pendens* and recognition it is important to note that it does not require Member States to recognise and grant binding effect to judgments rendered by third State courts including US class action/settlement judgments. However, Dutch and UK courts are bound to

refuse recognition of another Member State's judgment if that judgment is irreconcilable with the US class action/settlement judgments involving if the applicant's claim is subject to this class action/settlement. German and French courts may not grant this refusal to recognition because under its respective laws US class action/settlement does not have binding effect. Thus, assets of defendant companies in a US class action/settlement judgment are safe to re-litigating claimants if they are located in the Netherlands and the UK.

As of 10 January 2015, when the recast Brussels regulation entered into force, the Dutch and UK courts may stay/dismiss proceedings if the applicant's claim brought before them is subject to US class action/settlement proceedings/judgment and if this stay of proceedings is necessary for a proper administration of justice in the case at hand.

